

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF TEXAS
3 WACO DIVISION

4 TEXTRON INNOVATIONS, INC.) Docket No. WA 21-CA-740 ADA
5)
6 vs.) Waco, Texas
7)
8 SZ DJI TECHNOLOGY CO.,)
9 LTD., DJI EUROPE B.V.) December 9, 2021

10 TRANSCRIPT OF VIDEOCONFERENCE DISCOVERY HEARING
11 BEFORE THE HONORABLE ALAN D. ALBRIGHT
12

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25 Proceedings reported by computerized stenography,
transcript produced by computer-aided transcription.

15:59:47 1 THE COURT: Good afternoon, everyone.

15:59:49 2 Suzanne, if you'd call the case, please.

15:59:51 3 THE CLERK: Sure.

15:59:52 4 Discovery hearing in Civil Action W-21-CV-740,
15:59:57 5 styled, Textron Innovations, Incorporated vs. SZ DJI
16:00:02 6 Technology Company, Limited, and others.

16:00:04 7 THE COURT: If I could have announcements
16:00:06 8 starting with plaintiff.

16:00:10 9 MR. SIEGMUND: Good morning, your Honor.

16:00:11 10 This is Mark Siegmund with Steckler, Wayne,
16:00:12 11 Cochran & Cherry for Plaintiff Textron Innovations,
16:00:15 12 Incorporated. With me are my colleagues, Kevin Meek and
16:00:18 13 Harrison Rich from Baker Botts, LLP. We also have two
16:00:21 14 client representatives in attendance, Noah Tevis,
16:00:24 15 Associate General Counsel, and Elizabeth Pham, Senior
16:00:28 16 Assistant General Counsel for Bell Textron on behalf of
16:00:32 17 Textron Innovations, Incorporated. And, your Honor, Mr.
16:00:34 18 Rich will be the main speaker today.

16:00:36 19 THE COURT: Okay. And announcements for
16:00:38 20 defendant.

16:00:40 21 MR. PALMER: Your Honor, good afternoon.

16:00:41 22 John Palmer with Naman Howell for Defendants SZ
16:00:45 23 DJI Technology Company, Ltd., and DJI Europe B.V., which
16:00:51 24 we'll refer to as DJI. And our lead speaker will be Ben
16:00:56 25 Schlesinger from Finnegan.

16:00:59 1 THE COURT: Let me try something perilous here.
16:01:03 2 It's not that perilous, really, but let me try this. I
16:01:07 3 think I understand what is being sought here, which is
16:01:12 4 that the plaintiff would like to initiate discovery being
16:01:15 5 sent now because the defendants are -- it's a Chinese
16:01:20 6 defendant. If -- I'll just ask Mr. Siegmund because he's
16:01:23 7 on my screen.

16:01:24 8 Mr. Siegmund, is that a fairly -- bottom line,
16:01:27 9 that's what we're here for?

16:01:28 10 MR. SIEGMUND: Yes, your Honor.

16:01:29 11 THE COURT: Okay. So here is my proposal and
16:01:32 12 this is a proposal. If it doesn't work for anyone, I'm
16:01:36 13 happy to hear a better solution. You know, I've had to
16:01:40 14 deal with a number of these cases, and I understand how
16:01:44 15 even when the defendant is acting in good faith and when
16:01:48 16 they're represented by really good law firms, there are
16:01:52 17 still difficulties in collecting information in China and
16:01:55 18 then, and sometimes getting the information -- getting the
16:01:59 19 government of China to allow the information to be sent
16:02:01 20 here. And as I've told people before, I have, I guess,
16:02:06 21 unlimited power, but I don't know that the government of
16:02:09 22 China sees it the same way.

16:02:11 23 On the other hand, I don't know that -- I don't
16:02:14 24 think it's fair to have one party conducting discovery and
16:02:17 25 the other party not doing discovery. On the other hand, I

1 also don't really want to open all discovery right now.

2 And so, here is my proposal and I'll hear first, then,

3 from the plaintiffs, who are seeking the discovery.

4 Actually, I'll start with defendant, who's resisting it --
5 resisting it opening and see what you think of this.

6 What I would propose is that the plaintiff be
7 allowed to send the discovery and counsel for -- whatever
8 discovery they want. Counsel for defendant can make the
9 decision at what point they need to collect -- whether
10 it's now, whether it's two months from now, at the
11 Markman, whenever it is, they can -- counsel for the
12 defendant can, in consultation with their clients, make a
13 decision of how soon they need to collect, what they need
14 to collect, what they have to do to interface with the
15 Chinese government to get it over here, and then, I would
16 make the production of the discovery from the defendant
17 coincide with the production of discovery from the
18 plaintiff.

19 So in other words, defendant will be allowed to
20 -- obviously to start sending discovery as soon as the
21 Markman's over and whenever -- whatever that means with
22 respect to the plaintiff's discovery responses being due,
23 that's when I would key the defendants' discovery
24 responses being due. But the burden would be on the
25 defense counsel to decide when they need to begin. That's

1 the fairest thing I could think of for everybody because
2 I'm the only one who doesn't have a dog in the hunt.

3 But I'll hear first from counsel for the
4 defendant whether that's an acceptable plan or what I
5 could do to improve it.

6 MR. SCHLESINGER: Thank you, your Honor. This is
7 Ben Schlesinger.

8 If I understand correctly, we would receive their
9 discovery requests that would answer them in normal
10 course, after discovery's opened and under the normal
11 schedule. That's acceptable to defendants.

12 THE COURT: And, Mr. Siegmund, it's been a long
13 day, three Markmans, two discovery hearings. I don't
14 remember who you told me was going to be arguing on behalf
15 of plaintiff. So whoever it is, I'm happy to hear from.

16 MR. SIEGMUND: That will be Mr. Rich, your Honor.

17 THE COURT: Okay. Mr. Rich.

18 MR. RICH: Yes, your Honor. Good afternoon.

19 THE COURT: Good afternoon.

20 MR. RICH: Your Honor, I appreciate the proposal,
21 but I'm not sure it resolves all of our concerns because
22 as in the proposal, we won't necessarily know for sure,
23 one, when we're getting the information, but also, there
24 are going to be Chinese language documents in the case.
25 And speaking from experience, your Honor, translating

1 those documents is going to take significant time, and we
2 need to get that started as soon as we can so that we have
3 time to understand them, determine if followup discovery's
4 needed, prepare for depositions, and make strategic
5 decisions in the case. And so, since we're going to get a
6 big bulk of Chinese documents, I think having --

7 THE COURT: Well, what are you anticipating --
8 I'm not sure what you mean by a big bulk of Chinese
9 documents that are -- marketing documents? What is it
10 that you're anticipating will be in Chinese?

11 MR. RICH: Yes, your Honor.

12 During the meet-and-confer, I asked opposing
13 counsel if we're expecting technical documents in Chinese,
14 and I understand we are. I can't speak to whether there's
15 going to be marketing documents or other documents in
16 Chinese. But I know for sure --

17 THE COURT: I'm sorry to interrupt you. I don't
18 know what that means. Maybe defense counsel can tell me.
19 I'm not sure -- and I'll give you why I'm not sure is, one
20 of my law clerks is from China, has a couple of
21 engineering degrees, and he's had no -- it's not been a
22 barrier in English or Chinese to deal with the technology
23 side because most of that is not -- but I may be missing
24 something.

25 Let me hear from the defense counsel what you

16:06:32 1 anticipate would be sent that would be in Chinese that
16:06:36 2 might -- that's technical that might need to be
16:06:39 3 interpreted here. I'm not sure what that might be.

16:06:42 4 MR. SCHLESINGER: Sure, your Honor. There may be
16:06:44 5 a few documents that will be in Chinese that they may want
16:06:47 6 to interpret. You know, we've had that come up in cases
16:06:49 7 and never had an issue. You know, if you hire the right
16:06:53 8 translator, the right team, it's never been an issue. The
16:06:56 9 discovery right now is contemplated to be seven months.
16:06:59 10 That's more than sufficient time to allow for translation
16:07:02 11 of Chinese documents when plaintiff chose to sue a Chinese
16:07:07 12 entity.

16:07:07 13 THE COURT: That's where I'm at, too. Let me
16:07:09 14 hear again from plaintiff's counsel. I get your problem
16:07:14 15 with translation, but other than that -- and I could also
16:07:18 16 deal with that on the post-Markman side, which is, you
16:07:21 17 know, we can have additional months to do discovery to
16:07:26 18 take that into account, and you're still going to get to
16:07:29 19 trial in, you know, 26, 28 months. I mean, it's not going
16:07:36 20 to be substantially longer and probably shorter than most
16:07:38 21 places.

16:07:39 22 So do you have any other reason why from
16:07:42 23 plaintiff's perspective my solution would not work?

16:07:46 24 MR. RICH: Well, I do take issue with counsel's
16:07:50 25 statement that there hasn't been issues in the past

16:07:53 1 because we did look at the docket for the Daedalus
16:07:58 2 Blue-DJI case, and we understand there was disputes about
16:08:01 3 source code in that case. So we would urge an earlier
16:08:04 4 production for the source code.

16:08:05 5 THE COURT: But if I recall correctly, the
16:08:07 6 problem and that I'm requiring defendant to address
16:08:12 7 immediately is, they need to start now if they -- if it
16:08:17 8 takes it to make sure that they have taken every step that
16:08:21 9 they can to get the Chinese government to allow the
16:08:25 10 production of the source code from China to here. I don't
16:08:29 11 think in that case -- number one, that for sure -- that's
16:08:32 12 why I was asking you about translation because that's not
16:08:36 13 a problem with source code.

16:08:37 14 What I recall in every case where there was a
16:08:40 15 Chinese defendant and there was a problem with source
16:08:43 16 code, the problem was that the defendant was willing to
16:08:45 17 produce it, and the Chinese government was unwilling to
16:08:48 18 allow them to do so. And what I'm requiring the defendant
16:08:53 19 to do is, as soon as necessary, begin whatever steps they
16:09:00 20 take, which still doesn't guarantee, from my experience,
16:09:03 21 that in six months, they'll be able to get it to you.

16:09:07 22 But I definitely want the defendants to start
16:09:09 23 this point trying to do whatever it takes so that as soon
16:09:14 24 as possible, you will get the source code. They will do
16:09:20 25 everything they can to make sure that you get the source

16:09:23 1 code -- that they get the permission from China to get you
16:09:26 2 the source code in a timely manner.

16:09:30 3 MR. RICH: Understood, your Honor. Then I think
16:09:32 4 that's going to have to work for us.

16:09:33 5 THE COURT: Yeah. You know, it's just something
16:09:37 6 that is the reality of the world in 2021. And so, I'm
16:09:41 7 trying to get you everything that you deserve. I want to
16:09:46 8 make sure that you get it on time. But my experience from
16:09:49 9 sitting over here is that even with -- like I said, with
16:09:55 10 really good law firms and compliant defendants that that
16:10:00 11 doesn't -- that's not very compelling sometimes to the
16:10:03 12 Chinese government. But I definitely want the defendants
16:10:05 13 to be able to come in here if there is a problem -- and
16:10:09 14 I'm picking a date -- in August of next year, and there's
16:10:12 15 a problem, the defendant should be able to say, Judge, you
16:10:16 16 know, as soon as we got the request for source code, we
16:10:19 17 began working to try and ensure that we would be able to
16:10:22 18 produce the source code in a timely manner.

16:10:29 19 MR. MEEK: Your Honor, if I may, is there any way
16:10:31 20 that you could require the plaintiffs to also notify us --
16:10:32 21 excuse me, the defendants to notify us if there's some
16:10:34 22 impediment that we could be helpful in overcoming?

16:10:38 23 THE COURT: Mr. Meek, I think you just showed
16:10:41 24 it's so rare for you to be on the plaintiff's side, you
16:10:42 25 had a hard timekeeping the parties straight. That's just

16:10:45 1 because I know you --

16:10:47 2 MR. MEEK: Yes, Judge.

16:10:47 3 THE COURT: So, no. Listen, in fact, my
16:10:54 4 experience has been in the other cases that that was
16:10:56 5 actually the defendants' response, which was, Judge, we've
16:11:00 6 invited the plaintiff to help us get it, and if they can
16:11:03 7 figure out a way for us to get it, good on 'em. And so,
16:11:09 8 yes, you know, I would hope the defendant -- I would hope
16:11:12 9 the defendants' response to me was, Judge, the plaintiffs
16:11:17 10 can come on in, the water's fine for them, too. If they
16:11:20 11 could persuade the Chinese government of something we
16:11:23 12 can't, God bless them.

16:11:25 13 So absolutely, I would presume in this case that
16:11:29 14 lawyers of the caliber we have on both sides would with
16:11:33 15 respect to getting the source code that both sides agree
16:11:38 16 is appropriate out of China and into your hands. Now, one
16:11:42 17 thing I would suggest, just looking ahead and having done
16:11:45 18 this a couple of times -- and I don't know enough about
16:11:47 19 the defendant, so I'm just -- this is hypothetical.

16:11:50 20 But one thing, also, I think, we checked on in
16:11:54 21 several cases was whether or not the defendants -- the
16:12:01 22 Chinese company had for some other reason in the past, had
16:12:07 23 to send their source code outside of China. And I'll let
16:12:12 24 the defendant know in advance that they oughta know the
16:12:15 25 answer to that question because if, again, you come to me

16:12:18 1 in a hypothetical August of next year and defendant says,
16:12:23 2 the government won't let us do that, I'm going to ask,
16:12:26 3 well, has -- you know, has anyone else gotten it? Do you
16:12:29 4 have an affiliate somewhere not in China who you sent it
16:12:33 5 to so it's gotten outside of China, which is also another
16:12:36 6 way to skin a cat.

16:12:37 7 But, you know, for all of the -- you may have
16:12:42 8 read occasionally I'm in the press, for all of the
16:12:47 9 concerns that there are for being the number of cases I
16:12:49 10 have, here actually I'm aware of some of these problems
16:12:52 11 and can help out proactively. But if there are any
16:12:55 12 problems along the way, if I can help the defendants in
16:13:01 13 any way to get you the information that they're trying to
16:13:03 14 get you or you can, I would expect them to try that and I
16:13:07 15 will be absolutely willing to help.

16:13:12 16 MR. RICH: Thank you, your Honor.

16:13:12 17 THE COURT: Anything else we need to take up?

16:13:16 18 MR. RICH: Just one point of clarification on
16:13:17 19 that.

16:13:18 20 THE COURT: Sure.

16:13:19 21 MR. RICH: So we're allowed to serve the
16:13:21 22 discovery new and they're going to do what they can to
16:13:25 23 make sure that they can timely get it when discovery
16:13:26 24 opens?

16:13:27 25 THE COURT: Yes, sir.

16:13:28 1 MR. RICH: Will their response be due in the
16:13:30 2 normal 30-day course of dealing, or is that after the
16:13:33 3 Markman?

16:13:33 4 THE COURT: I'm a good for the goose, good for
16:13:35 5 the gander. Whenever it is you're planning to get your
16:13:38 6 responses to them, they need to be able to get it to you.
16:13:41 7 So do they need to get it on the 30th day, no holds
16:13:46 8 barred, no. But do they need to get it in the same with
16:13:48 9 all litigation to you in a reasonable time, shortly after
16:13:52 10 30 days or around 30 days in the same way you've gotta get
16:13:56 11 them stuff, yes. That's my plan. If they can't --
16:14:00 12 assuming they can. And so, that's why I'm saying it's the
16:14:04 13 burden is on defendants to begin the production, begin the
16:14:09 14 exercise in collecting or doing the production so that you
16:14:14 15 all will be on parallel tracks in terms of your
16:14:17 16 production, meaning the plaintiff's production and theirs.

16:14:20 17 MR. RICH: Okay. The reason I asked was, to the
16:14:23 18 extent we didn't get the objections until after Markman,
16:14:27 19 we've started this process of them going to see if they
16:14:30 20 can get the information to us. We wouldn't know if
16:14:33 21 they're objecting or not committing to do something until
16:14:37 22 it's too late perhaps. So that's why I was --

16:14:39 23 THE COURT: Well, here's the deal. I think the
16:14:41 24 number-one thing that you all need immediately, would be
16:14:43 25 my guess, is -- and, again, you know, y'all are all better

16:14:48 1 lawyers than I was. But my guess is, the main thing you
16:14:52 2 want is source code, right? I mean, that's the thing you
16:14:54 3 need to prove infringement.

16:14:55 4 And I would be surprised that -- you all may have
16:14:58 5 issues with the protective order, and all that stuff, you
16:15:01 6 know, who looks at it and all that stuff, but I would be
16:15:05 7 -- I would be surprised if I was very sympathetic to you
16:15:09 8 not being -- if there were many objections to the
16:15:11 9 production of source code as long as it was relevant to
16:15:15 10 being able to prove your infringement case.

16:15:18 11 MR. RICH: Okay.

16:15:19 12 THE COURT: To me, that's really the focus here.
16:15:21 13 I know that you need marketing documents from them. I
16:15:23 14 know that you need licenses from them.

16:15:26 15 Let me go ahead -- and now that I've said
16:15:29 16 licenses. I think it would be a good idea for -- and I'll
16:15:33 17 make this bilateral. I don't know how many either we
16:15:36 18 have, if either -- especially for the Chinese defendant.
16:15:39 19 If the Chinese defendant has entered into other IP
16:15:44 20 licenses, I would ask the defendant to go ahead and
16:15:48 21 collect those as soon as possible and for those -- because
16:15:52 22 I doubt there will be many. For those, if they are in
16:15:55 23 Chinese or a different language, I'll have you produce
16:15:58 24 those now. And I'll have the plaintiffs, if they have
16:16:02 25 licenses that would be -- might be relevant, they can

16:16:05 1 produce those to you, to the defendant, as well. I doubt
16:16:09 2 that's a very large ask.

16:16:13 3 MR. RICH: Understood, your Honor. And this call
16:16:15 4 has been focused a lot on the Chinese entity. There is
16:16:19 5 also a European DJI entity at issue and I'm not sure what
16:16:24 6 licensing role they play, but to the extent that they have
16:16:27 7 licenses, I'd appreciate production of those, as well.

16:16:31 8 THE COURT: Well, here's my rule -- let me flip
16:16:34 9 to the defendant. If -- the point of getting the ones if
16:16:38 10 there are any from the Chinese entities, they're probably
16:16:41 11 in a Mandarin, or Cantonese, or whatever, and all that, if
16:16:48 12 you would like, I'll only require you to produce those and
16:16:51 13 not -- at this time and not those from Europe. If you
16:16:55 14 would like me to also give you the plaintiff's licenses at
16:16:58 15 this time, then I'll make it even and I'll have the
16:17:01 16 defendants collect all their licenses, and y'all can
16:17:03 17 exchange them at the same time. I don't care which. And
16:17:07 18 I don't know if there are any.

16:17:10 19 Why don't we do this. You all understand my
16:17:12 20 general parameters. You all can work it out. Whatever
16:17:16 21 you all work out is fine. What I'm really trying to get
16:17:18 22 done is, A, find out if there are any licenses that the
16:17:23 23 defendants entered into that would be relevant and, B, if
16:17:28 24 they're in Chinese, to get them to you.

16:17:31 25 MR. RICH: Understood, your Honor.

16:17:33 1 MR. PALMER: And, likewise, your Honor, if there
16:17:34 2 are any licenses that plaintiff has that are relevant, we
16:17:37 3 could get those; is that right? Correct?

16:17:40 4 THE COURT: Well, what I said was, if you all
16:17:41 5 want plaintiff's licenses, then you're also going to
16:17:45 6 produce all the European licenses.

16:17:47 7 MR. PALMER: That's --

16:17:47 8 THE COURT: If you don't want to produce the
16:17:49 9 European licenses right now, then the only production will
16:17:54 10 be of the licenses that are in Chinese.

16:17:55 11 MR. PALMER: Thank you for that. That's where I
16:17:57 12 was going. Thank you.

16:17:58 13 THE COURT: Okay. Anything else?

16:18:01 14 MR. RICH: Nothing from me, your Honor.

16:18:02 15 THE COURT: Well, hopefully this has been
16:18:05 16 productive. I will -- I know several of you. You know,
16:18:10 17 the Waco lawyers for sure who have been in front of me
16:18:14 18 hundreds of times know that the only way that you all will
16:18:18 19 get in trouble with me is if you delay raising an issue
16:18:22 20 with me to where I can't really fix it because time has
16:18:25 21 passed. So in other words, I'm encouraging you,
16:18:28 22 especially in cases that may have unique problems, the
16:18:31 23 door is open.

16:18:32 24 I think this is Jeff Melsheimer's case. If you
16:18:36 25 have any problems you can't work out, sooner is better in

16:18:40 1 terms of coming to me, and we'll find time, especially if
16:18:44 2 it happens after April 1st, when I have a new magistrate
16:18:48 3 judge and he can deal with it. And you'll have an even --
16:18:53 4 a bigger green light. Or you never know. We won't tell
16:18:56 5 you who's handling it. You might get the black bean and
16:18:59 6 wind up with me again.

16:19:01 7 But I would rather hear things sooner, always
16:19:06 8 sooner so I can help y'all figure them out.

16:19:11 9 MR. RICH: Thank you, your Honor. Understood.

16:19:13 10 THE COURT: Anything else?

16:19:14 11 MR. SCHLESINGER: Not from defendants.

16:19:15 12 THE COURT: Okay. Very good. I've enjoyed this
16:19:17 13 as always. I'm going to go ahead and take the rest of the
16:19:21 14 day off. Thank you very much for your time. I hope you
16:19:24 15 all have a wonderful Christmas or whatever it is you
16:19:27 16 celebrate. I hope you have a wonderful new year. And I
16:19:30 17 hope I get to see at least some of you in the near future.
16:19:33 18 Have a good time. Take care.

16:19:35 19 MR. PALMER: Merry Christmas.

16:19:37 20 THE COURT: Merry Christmas.

21 (Proceedings concluded.)

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UNITED STATES DISTRICT COURT)
WESTERN DISTRICT OF TEXAS)

I, LILY I. REZNIK, Certified Realtime Reporter,
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